No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent,

and

UNITED STATES,

Respondent-Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF OF *AMICUS CURIAE* ACA INTERNATIONAL, INC. IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY FACEBOOK, INC.

KELLEY CLARK MORRIS
GRAY REED & MCGRAW LLP
1300 Post Oak Boulevard,
Suite 2000
Houston, TX 77056
(713) 986-7000

S. GREG WHITE
Counsel of Record
JIM MOSELEY
GRAY REED & MCGRAW LLP
1601 Elm Street, Suite 4600
Dallas, TX 75201
(214) 954-4135
gwhite@grayreed.com

Attorneys for Amicus Curiae ACA International, Inc.

292508

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE* ACA INTERNATIONAL, INC.

ACA International, the Association of Credit and Collection Professionals, is a not-for-profit corporation based in Minneapolis, Minnesota.[1]

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information, and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA company members range in size from small businesses with a few employees to large, publicly held corporations. ACA company members collect rightfully owed debts on behalf of other small and local businesses. ACA members include businesses that operate within a single town, city, or state and large national corporations that do business in every state. Approximately 75% of ACA's company members have fewer than twenty-five employees.

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1. No Party's counsel authored this brief in whole or in part. No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than Amicus Curiae ACA International, its members, and its counsel—contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this Amicus Brief. Counsel of Record complied with Rule 37 by providing notice of its intent to file an amicus brief more than 10 days before the filing date.

ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers.

In years' past, the combined efforts of ACA members has resulted in the annual recovery of billions of dollars—dollars that are returned to and reinvested by businesses, and that would otherwise constitute losses to member businesses. Without an effective collection process, the economic viability of these businesses—and, by extension, the American economy in general—is threatened. The recovery of rightfully owed consumer debt preserves business; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.

In 2017, ACA commissioned a study to measure the various impacts of third-party debt collection on the national and state economies. The study found that in 2016:

- Third-party debt collectors recovered about $78.5 billion from consumers on behalf of creditors and government clients, to whom nearly $67.6 billion was returned.[2]

- The third-party collection of consumer debt returned an average savings of $579 per household by keeping the cost of goods and services lower.[3]

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2. Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016*, 2 (Nov. 2017), https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf.

3. *Id.*

The Telephone Consumer Protection Act (TCPA) permits the use computer equipment to dial phone numbers, but not to generate numbers. Using a machine to dial a selected and specific number, as ACA members commonly do, does nothing to diminish the legitimate protection that consumers are entitled to receive from unsolicited telemarketing robocalls.

Although ACA members are engaged in a legitimate effort to collect legally enforceable obligations, they are, more recently, subjected to legal action that uses the TCPA as a money-maker for consumers and lawyers who represent them. One consumer credit expert is offering a "kit" to "turn robocalls into cash."[4] Due to some circuit court holdings that appear to ban any use of a device that calls a number without a human finger pressing digits, the TCPA has become more of a money-making system than it is a consumer protective system.

SUMMARY OF THE ARGUMENT

ACA's interest in this case is based, in part, on the application of this statute to its members—persons and entities in the business of collecting debt. Debt collection companies use lists of telephone numbers to contact debtors. Debt collectors use targeted lists and store numbers identified with specific, identified debtors. The stored numbers are intended to provide a means to contact a specific person for a particular reason. ACA members do not randomly or sequentially dial phone numbers, in hopes of coming upon a person who owes money by mere coincidence. A random or sequential calling system would

4. ROBOCALLS.CASH, http://robocalls.cash (last visited Nov. 18, 2019).

be economically disastrous and would possibly run afoul of other federal statutes, including the Fair Debt Collection Practice Act, 15 U.S.C. §§ 1692–1692(p), or the Do Not Call Registry, 16 C.F.R. § 310.4 (FTC Rule) and 47 C.F.R § 64.1200(c) (FCC Rule).

Efforts to contact a person to collect a debt are not perfect. Some debtors actively avoid contact, some do not update their contact information, and some debtors provide erroneous information. Stored lists of possible contact information are an efficient, organized, and permissible means of exercising an undisputed right to attempt to collect legitimate debts.

The Ninth Circuit reimagined the definitions in the TCPA in a way that makes the use of equipment that stores phone numbers to contact people illegal. The decision below is wrong for three separate reasons.

First, underlying the opinion below is judicial activism: the idea that the courts should do what Congress did not. The Ninth Circuit expanded the TCPA by reading words into the statute. Had Congress intended to ban all automated dialing systems, it could have done so, and likely would have used plain language to do it. It would not have attached significant penalties for something that virtually every American does every day—dial a phone number from a stored list. The plain language of the statute—the language actually used by Congress—prohibits the use of equipment that can generate random or sequential numbers. Equipment that does not do that does not violate the statute. Enforcing the plain language of the statute—as Congress intended—provides certainty,

predictability, and fairness. *See United States v. Locke*, 471 U.S. 84, 95–96 (1985).[5]

Second, an important distinction exists between telemarketing robocalls and calling a stored number. The plain language of the statute prohibits telemarketing robocalls. Conversely, calling a stored number is just as plainly permitted. The real-life differences between the two justify this distinction. Companies that use a list of stored numbers to target specific people for a specific purpose do not want to use random or sequential number generators to find their audience; to do so would result in a colossal waste of time and economic resources. Indeed, random and sequential calling would only serve to increase a debt collector's risk of violating other federal laws specifically and unmistakably aimed at protecting consumer privacy.

Third, using a list to contact specific people is a conventional means of communication not limited to businesses like debt collectors or customer surveys. Expanding the TCPA's plain language to include every call made from a stored list would render ordinary Americans, small businesses, and innocent organizations as violators.

Finally, while people may not welcome calls from debt collectors, any unpleasantlness is not a license to

5. "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. 'There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.'" *Id.* (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (italics in original).

penalize the lawful speech. The statutory language defining an automatic telephone dialing system draws the right balance for limiting commercial speech because the statute identifies the evil to be addressed and uses words that only limit speech in a way that is designed to address that evil.

ARGUMENTS AND AUTHORITIES

Issue No. 1: Congress spoke in clear and straightforward language, and that language permits the use of a machine to dial telephone numbers in many instances. What Congress prohibited was the use of a machine to dial random or sequential numbers. Indiscriminate dialing is not the same thing as purposeful contact with specific consumers.

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"), bans a specific kind of communication. It addresses the nefarious robocall—an indiscriminate communication between a telemarketer's computer-aided calling system and a random consumer made for the sole purpose of selling goods, services, or investments to whomever answers. Congress clearly limited and penalized the use of automatic dialing systems to contact consumers for this purpose. What Congress clearly did *not* do was place an absolute prohibition on the use of a computer-aided calling system for specific meaningful communication with a specific, unique consumer.

The plain language of the statute permits the use of equipment to store numbers if the numbers are not random or sequential.

A. The TCPA defines an "automatic telephone dialing system" in simple terms:

> (1) The term "automatic telephone dialing system" means equipment which has the capacity--
>
> (a) to store or produce telephone numbers to be called, using a random or sequential number generator; and
>
> (b) to dial such numbers.

47 U.S.C. § 227(a)(1). The statute then makes it unlawful to use such a system to make any call:

> to any telephone number assigned to a paging service, a cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.

Id. § 227(b)(1)(A)(iii). The penalty for making a call that violates the Act is a minimum of $500 for each violation. *See id.* § 277(b)(3)(B).

ACA members rely on this plain language. The calls that ACA members understand to be prohibited are those placed by an automatic telephone dialing system, and they understand that the sole characteristics of an automatic telephone dialing system are that it "stores or produces"

phone numbers by using a "random or sequential number generator." The Act prohibits using a machine that dials "such numbers"—the ones stored or produced by the random or sequential number generator.

ACA members also understand that Congress has the power to regulate communication about debt collection. The TCPA limits commercial speech—speech and conduct that relates to the private economic interests of the speaker and the audience. *See Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 761–62 (1976). When a statute limits commercial speech, the government must carefully balance interests. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995). In the TCPA, Congress has already crafted the required balance by using plain language quoted above.

But some courts have been unwilling to enforce the TCPA's plain language—preferring to make their own rules about what kind of calls violate the Act and what kind of calls result in statutory penalties. The Ninth Circuit did precisely that by "rearticulat[ing]" the statutory definition so that the Act prohibited any call from equipment "with the capacity to store numbers to be called" or with the capacity to "produce numbers to be called, using a random or sequential number generator." *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1149–50 (9th Cir. 2019) (citing *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)).

The rearticulated definition significantly alters congressional language because it includes any device that has the *capacity* to store and dial telephone numbers—regardless of how those numbers were generated.

Congress meant to limit the use of devices that store numbers using a random or sequential number generator.[6]

Congress could have defined the automated telephone dialing system in a variety of ways that would have reached more broadly than the actual language used. But the statute addresses a specific type of call that perniciously invaded the privacy of citizens— an indiscriminate call made to attempt to sell things. The intent of the Act to reach these robocalls is evident in other parts of the statute.

B. The structure and context in the statute show that Congress was addressing a specific issue— telemarketing robocalls.

In other parts of the TCPA, Congress explicitly defines "unsolicited advertisements" (material advertising

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6. It does not help to quibble over the punctuation used by Congress. The Supreme Court of Vermont said:

> In construing statutes, we will not indulge in quibbles over minute points of punctuation; they are among the atomies of grammar. At best, the so-called grammatical stops are widely misunderstood and applied even among average and reasonably well-educated laymen, including legislators and, *mirabile dictu*, even judges. Legislatures are not grammar schools; and, in this country at least, it is hardly reasonable to expect legislative acts to be drawn with strict grammatical or logical accuracy. For that reason the construction of a statute should be based on the whole statute.

Hill v. Conway, 463 A.2d 232, 234 (Vt. 1983) (internal punctuations and citations omitted).

the availability of property, goods or services)[7] and "telephone solicitation" (a call encouraging the purchase, rental or investment in property, goods or services).[8] Congress was concerned with unwelcome sales pitches that were plaguing consumers.[9]

There is a legally and factually significant difference between a telemarketing robocall and a customer contact call like ACA Members use. Congress understood that the robocall was the random automatic dialing of a phone number with no purpose in mind other than getting a person—any person—to answer. The person who answered was then subjected to a high-pressure sales script to sell something the person did not want to buy. The unwanted pressure of a professional seller insistent on getting the consumer to part with money was made more powerful and more invasive by the computer-aided method of a random selection of the numbers called. Consumers were alarmed by the frequency and persistence of calls because they immediately understood that the call had nothing to do with them as a person, but that they were called because some computer picked them out at random.[10]

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7. 47 U.S.C. § 227(a)(5).

8. 47 U.S.C. § 227(a)(4).

9. In 47 U.S.C.§ 227(c)(1), Congress gave the FCC the power to make rules to ensure that "residential telephones" could avoid receiving telephone solicitations to which they objected.

10. When passing the TCPA in 1991, Congress made fifteen specific findings to support the passage of the Act. Of those fifteen, nine findings specifically mention "telemarketing" or "soliciting" or both. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394.

Those telemarketing robocalls are addressed by the TCPA. And those telemarketing robocalls are very different from a call to a specific person in an attempt to collect a debt:

Telemarketing Robocalls	Stored Number Contacts
The caller designs a sales script.	The content of the call depends on the conversation with the recipient.
A computer randomly selects a telephone number.	The caller selects the recipient.
A computer dials the number.	A computer suggests numbers that will likely result in effective communication of the message to the selected person.
The recipient is a randomly selected target of a spam message.	The caller selects, among possible numbers, which should be used so that the caller can talk to a specific person.

The recipient has no idea why they were selected to receive the call.	The recipient has an identifiable prior relationship to the message that makes it rational that this particular recipient would be contacted. While the recipient may not have anticipated the message, the recipient is not surprised that they were called.

The Ninth Circuit opinion below provides no rational basis to conclude that rearticulating the definition of an "automatic telephone dialing system" is necessary to accomplish the goal that Congress intended to address—protection from unwanted sales pitches. The language that Congress used, without a new parsing of words, does exactly what Congress set out to do.

The substantial penalties for violating the statute also show that Congress did not intend to penalize every call made from a stored list. Undoubtedly, Americans would be surprised to learn that every day they were violating a federal statute simply by placing a call using their smartphones. The smartphone that stores numbers and dials them without further human intervention is squarely within the rearticulated definition in the Ninth Circuit's opinion. Americans would be violating the TCPA by making a call from their contact list even though that method of making a call is convenient and ordinary and is easily the most accurate way of dialing a phone number.

ACA members think the same thing. ACA members select phone numbers that are most likely to result in contact with a specific person who owes a specific debt. And storing a list of those numbers in a machine that will dial those numbers when requested is the most accurate way of dialing those numbers correctly.

The whole of the statute is clear enough that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The Ninth Circuit's rearticulated definition "leaves the public uncertain as to the conduct it prohibits [and] leaves judges . . . free to decide . . . what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966). And a rearticulated definition that changes the plain meaning of the statute exposes ACA members and others to significant penalties without a clear understanding of precisely what kind of equipment is prohibited.

The Ninth Circuit opinion plays on the frustration suffered by recipients of telemarketing calls to suggest that the general public would welcome new definitions in the TCPA that expand its reach. It may be that Congress could have done a better job of protecting consumers from unwanted calls. But the question for the courts is not whether Congress could have done a better job, but to declare what Congress did in fact. *See Regan v. Time, Inc.*, 468 U.S. 641, 704 (1984).

C. The purpose of the statute was to limit only a specific type of automated calling.

People may argue that Congress would endorse broad prohibitions on calls to consumers. But deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice. "[T]o assume simplistically that *whatever* furthers the statute's primary objective must be the law frustrates rather than effectuates legislative intent." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

Every person has their phone number stored on someone else's phone. It might be a friend from high school. It might be a church member from a former church. And, it might be a former boyfriend's social network. Any of those groups might seek to communicate easily and efficiently. A consumer might also be on a list of car owners who need to be contacted about a recall of their vehicle, or on a list of customers who are particularly vulnerable to a credit card scam, or on a list of property owners who might be interested in recently filed building permits in their neighborhood.

People sometimes wish no one had their phone number. Some do not want to be contacted; some are grateful for essential notifications. Some are annoyed, frustrated, or offended by attempted contact; some are glad that they received individualized customer service. Under the Ninth Circuit's opinion, using any equipment that stored a list of phone numbers and dialing a stored number from that equipment is a violation of federal law and subjects the caller to penalties. In other words, every smartphone in America is an automatic telephone dialing system.

But calling from a list of specific stored numbers does not run afoul of any of the purposes of the TCPA. It is not a random number or a numerically sequential number. A stored number list has numbers generated with the purposeful effort and intervention of humans—not robots. It identifies persons that are related to the message in a unique way. The contact is based on a message that the caller has a legal right to convey, and a right to expect a response.

As Chief Judge Easterbrook of the Seventh Circuit wisely explained:

> Courts do try to avoid imputing nonsense to Congress. This means, however, modest adjustments to texts that do not parse. It does not mean—at least, should not mean—substantive changes designed to make the law "better." That would give the judiciary entirely too much law-making power. . . . Nor should a court try to keep a statute up to date. Legislation means today what it meant when enacted.

Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 642 (7th Cir. 2012) (citation omitted).

Consumers do not need the judicial system to create an expanded TCPA. If a debt collector uses abusive tactics, the Fair Debt Collection Practices Act provides ample protection and remedies. If debt collector violates the Telemarketing Sales Rule or the National Do-Not-Call Registry rules, a consumer has adequate protection and remedies. Additional protection under a separate section of the TCPA is unnecessary and unintended.

And, courts should not invoke judicial power to change legislation to make the law align with judicial preferences. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004). In the meantime, this Court "has no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U. S. 782, 794 (2014). Courts are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994).

D. Courts agree that an "automated telephone dialing system" includes only equipment that stores or produces numbers randomly or in sequence.

In September of this year, the Sixth Circuit issued an opinion that is in apparent conflict with the Ninth Circuit's opinion here. *Gary v. Trueblue, Inc.*, No. 18-2281, 2019 U.S. App LEXIS 26959 (6th Cir. Sept. 5, 2019).[11] In *Trueblue*, the complaint centered on a messaging platform that a staffing company used to send texts about potential jobs to people who signed up for the service. A jobseeker had originally signed up for the service, but later revoked his consent. He alleged that he received over 5600 text messages that he did not want.

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11. The Sixth Circuit opinion in *Gary v. Trueblue* is "not recommended for full-text publication."

The *Trueblue* court, like the Ninth Circuit below, considered whether the messaging system was an automated telephone dialing system under the TCPA. The district court held that, because the messaging system could not randomly or sequentially text numbers as required by the plain language of the TCPA, the messaging platforms do not automatically violate the statute. The Sixth Circuit did not disagree. Whether the equipment has the "capacity" to generate random or sequential numbers is not a question of what the equipment can be made to do, but whether the equipment is actually used to dial numbers at random or in numerical sequence. *Id.* at *4-5; *see also Gary v. Trueblue, Inc.*, 346 F. Supp. 3d 1040, 1046–47 (E.D. Mich. 2018).

This is precisely how the ACA members understand the statute. The TCPA prohibits the use of automated equipment to dial random or sequential numbers but does not prohibit the use of equipment that dials numbers that have been purposely selected and stored for later use. ACA members need to contact specific persons as efficiently and expeditiously as possible, and the use of software to dial from a list of stored numbers is designed to make effective contact. Interpreting the TCPA to require ACA members to dial phone numbers manually introduces a significant opportunity for human error, resulting in more calls to the wrong person. Additionally, manual dialing would slow down the collection process, driving up the cost of debt collection, and thus, the cost of debt. Ultimately, the Ninth Circuit's statutory interpretation hurts the American people, rather than protecting them.

E. Congress was clear in its language, structure, and purpose: Using equipment that simply dials a predetermined stored number does not violate the Act.

The Ninth Circuit's opinion below rewrites the TCPA in the guise of rearticulating a critical definition. In doing so, it makes illegal conduct that Congress did not. It penalizes people that Congress did not. It hamstrings business that Congress did not.

Issue No. 2: Commercial speech, even about unpleasant topics, is nevertheless protected by the First Amendment. Congress struck a careful balance when it passed the Telephone Consumer Protection Act, and the Ninth Circuit has upset that balance.

As written, the TCPA is not a blanket prohibition on calls to collect a debt. Such a call may be unpleasant to receive, but the request to pay for goods or to repay a loan is a legitimate, not random, reason for contact. Companies in the business of collecting debt would naturally seek to use technology to make the work efficient, to make contact and response productive, and to make resolution simple. Congress permitted precisely that. It proscribed the use of technology to invade the privacy of random consumers, but no part of the statute prohibits a call to a person who owes money to settle the debt. Nor does the statute forbid the use of efficient technology to aid that task, even unpleasant ones.

The First Amendment's guarantee of free speech is not limited to only those categories of speech surviving the balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the

American people that the benefits of its restrictions on the Government outweigh the costs. "Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

The Ninth Circuit's opinion does precisely what the Constitution will not permit. The court's parsing of the statute and ultimate ban of all speech made in apparent violation of the rearticulated TCPA definitions effectively punishes speech based on the subject matter—unpleasant topics consumers wish to avoid. Under this Court's precedent, however, the government may not weigh the value of that economic interest and declare it unworthy. *Id.* at 469–70.

CONCLUSION

For the reasons stated herein, ACA International respectfully urges the Court to grant Facebook's Petition for Certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

Kelley Clark Morris
Gray Reed & McGraw LLP
1300 Post Oak Boulevard,
Suite 2000
Houston, TX 77056
(713) 986-7000

S. Greg White
Counsel of Record
Jim Moseley
Gray Reed & McGraw LLP
1601 Elm Street, Suite 4600
Dallas, TX 75201
(214) 954-4135
gwhite@grayreed.com

Attorneys for Amicus Curiae
ACA International, Inc.